The Central Law Journal.

ST. LOUIS, NOVEMBER 14, 1884.

CURRENT TOPICS.

Another good judicial nomination has been made by President Arthur. Judge Gresham has been appointed to succeed Judge Drummond. The appointee has a good legal mind and was a very popular Federal District judge in Indiana, before receiving his ap pointment as postmaster-general. He is a man who has rendered considerable service, having been a Union general, District judge, Postmaster-general, and Secretary of the Treasury. We predict for him a successful career in his resumption of judicial duty.

The doctrine of *stare decisis* is a perfect bore. Hardly do we conclude that it has been settled, ere some court launches out into a new exposition of its extent, and we fear that it will ere long share the fate of the beggar's boy who was so dressed up by a charitable friend that his own father did not recognize him. "The decisions of courts are not the law," we are told by the Indiana Supreme Court in the recent case of Hibbits v. Jack, thus resuscitating the old theory once more. We emphatically agree with the Indiana Supreme Court, if it refers to some of its own decisions. When a court reverses itself twice, or in other words, takes a double somersault within ten years, upon a simple question of interest, we feel as if a gold medal should be awarded to this judge for candidness and veracity, with respect to some of its own decisions. The Supreme Court of Missouri has no ground for laughter "behind the scenes," as it may see its own reflection somewhere in this paragraph. Decisions, says the Indiana Court, "are only the evidence of the law; and this evidence is stronger or weaker according to the number and uniformity of adjudications, the unanimity or dissensions of the judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which those reasons are expressed. *Stare decisis* does not mean adherence to the last decision of a court, when so to adhere would be a desertion of the ancient and established law; and the principles underlying titles to real estate must rest on a better and more stable basis than an erroneous judgment of a court. A single decision never called in question, but consistently acted on, and generally acquiesced in, for a series of years may constitute a rule of property; while a line, or very considerable number, or interrupted and conflicting decisions do not. Courts can not with propriety, perpetuate an erroneous decision, nor even a series of erroneous decisions, unless such decisions become a recognized and well settled rule of property which the public interests require shall not be disturbed. Whether a particular case, or line of cases, shall be overruled is always a question resting in the sound discretion of the court, to be decided with reference to the public welfare, and not by any merely private interest. The mere overruling of the principles announced in a given cause does not disturb property rights which have become vested under it. What was decided by a case, afterwards overruled, continues to be the law of that case as between the parties and those claiming under them. Hence, the Spurgeon case never became either a rule of property or a precedent of binding anthority in any subsequent case. The property rights of the parties therein, and of those claiming under them remain intact But as to all other persons, a different rule of construction in similar cases has, both previously and subsequently, prevailed, and must still be applied. If the appellant was, in fact, misled by the case, it is a misfortune to be most sincerely regretted; but it is without remedy."

The Supreme Court of Indiana has in the late case of Murphy v. State upheld a law authorizing persons accused of crime to waive a trial by jury. Sufficient has been already said in this regard in these columns to excuse any further comment. So long as it rests in the discretion of a litigant to demand a jury trial, the advocate of the retention of the jury system need not fear, as those who are of opinion that a single judge can give them satisfaction have themselves only, to blame, if they become dissatisfied with the result. And if a man is content to rest his chances for

acquittal or conviction, upon the manner in which the testimony may strike the mind of a single man, so long as only his own liberty or money is at stake we see no ground for faultfinding. But when a man stakes his liberty upon such a decision and the interests of a wife and children are likely to be affected, no court can be too bold in declaring any consent to a trial other than by the tribunal, which has come down to us as an institution which has resisted the hostile criticism of centuries, and sanctioned by the fundamental law of almost every state in the land, to be in violation of the spirit which governed the framers of the constitutions and every law authorizing such consent to be in conflict with their object.

We have heard of men trying to blow hot and cold at the same time and it seems litigants are no exception to the rule. In Holden v. The Metropolitan Savings Bank, which come to us from the Massachusetts Supreme Judicial Court, the plaintiff to provide for any contingency, or in slang phrase, to "make himself solid," claimed that the assignment of certain securities of the bank of whose affairs he had charge, was invalid, and therefore the defendant to whom the cashier has pledged them for his own purposes had no title to them. They conceded it to be valid, and therefore claimed title to the proceeds of sale, because they could have no remedy against the corporation, whose stock was thus pledged. It seems the cashier had taken stock, had it transferred to his own name, and pledged the new certificate to the defendant, for advances made in good faith. Plaintiff claimed that the cashier had no authority to do this, therefore the defendant was bound to account for the proceeds. But the court was unable to regard the matter in this light. Said the court:

"Pratt assumed to act for and by authority of the savings bank. If he had authority the assignments and transfers of the stock, and the surrender of the old certificates and the issuing of new ones, were valid and the new certificates represented stock which belonged to the savings bank as general owner, and the plaintiffs are entitled to the surplus of the proceeds of the sale of it above the amount for which it was pledged. If Pratt's acts were not authorized they may be ratified with the same effect as if there had been previous authority, if not authorized or ratified the assignments and transfers and surrender of the old and issue of the new certificates were all null void as to the plaintiffs, whose stock remained unassigned and held in legal contemplation under the old unsurrendered certificates, and the plaintiffs had no interest in the new certificates or the stock they represented.

The plaintiffs cannot both deny and affirm the validity of the transfers of their stock to the defendant By denying the validity of the transfers, they necessarily disclaim the ownership of the stock represented in the certificates issued upon such transfers; by affirming the validity of the transfers, they ratify the pledge of the stock. In the one case the stock sold, would not belong to the savings bank; in the other the sale would be authorized by the savings bank. In neither case can the plaintiffs recover in this motion, which is founded on an unlawful sale of the stock belonging to the savings bank. Pratt v. Taunton Copper Manufacturing Co. 123 Mass. 110. Machinist's National Bank v. Field, 126 Mass. 34 . Boston & Albany Railroad Co. v. Richardson, 135 Mass. 473."

ADDITIONAL COMPENSATION FOR ADDITIONAL BURDENS TO OWNERS OF PROPERTY ABUTTING ON STREETS.

I. PROPOSITION.
II. RIGHT TO RECOVER COMPENSATION.
III. ILLUSTRATIONS.

I.
PROPOSITION.

II.
RIGHT TO RECOVER COMPENSATION.

(1). How Streets are Acquired—Damages—Benefits.
(2). Benefits Contingent on Uses to which Streets may be put—Implied Restrictions.
(3). Nature of Abutting Owners Interest in Streets.
(4). Immaterial whether City Own Fee or Easement.
(5). Constitutional Provisions—Taking—Damaging.
(6). Extent of Cities Property in Streets.

III.
ILLUSTRATIONS.

(1). Preliminary.
(2). Gas and Water-pipe—Sewers.
(3). Steam Railways.
(4). Street Railways.
(5). Telegraph and Telephone Wires.

I.
PROPOSITION.

The purpose of this article is to determine whether or not the owner of land abutting on a street, has such a property therein as is within the protection of that general constitutional provision, which forbids the taking of private property for public use, without just compensation. Upon the authority of the subjoined cases the conclusion has been reached, that he has such a property, and that any use of the street, not

fairly within the contemplation of the parties at the time of its appropriation, which injuriously affects the enjoyment of the abutting land, is a taking for which compensation should be made.

II.

RIGHT TO RECOVER COMPENSATION.

(1). *How Streets are Acquired—Damages—Benefits.*—Streets are secured to the public, either through the voluntary dedication of individuals, or by condemnation. Where dedicated, it is to be presumed, that the owner of the property, over which the right of way is granted, has in view his private advantage, as well as the public good. Land in cities is not usually available for the ordinary uses to which city property may be put, unless it be divided into suitable lots, each of which shall have immediate communication with the public streets. It is customary, therefore, in case of necessity, to devote a portion of city property to the public use, with a view to enhancing the value of the remainder. When streets are condemned, the advantage resulting to the abutting owner, is an important consideration in estimating the amount of compensation to which he is entitled under the constitution. If the benefits equal the damages, the owner will be considered to have received full compensation, though he be paid nothing, and in every case the amount of the benefits is deducted from the damages allowed.[1]

(2). *Benefits Contingent on Uses to which Streets put—Implied Restrictions.*—These benefits, obviously, depend upon the uses to which streets may be put by the public. If such uses be restricted to those fairly within the contemplation of parties at the time of the appropriation of the streets, an abutting owner has no ground for complaint. Where the street was dedicated, he suffers the reasonable consequences of his voluntary act; where condemned, he has received a just compensation for any damage inflicted. If, on the other hand, an appropriation of land for streets, is an appropriation to public use generally, without restriction or restraint to the particular uses contemplated, the private advantage of the abutting owner is in the highest degree precarious. What was designed to afford ready access and light and air to property, might be perverted to a use utterly inconsistent with this purpose, and destructive of the private benefits hoped and expected of the appropriation. Land condemned for a street and appropriated to this use without any compensation whatever, on the presumption that the benefits equal the damages, might afterwards be blocked by a gas holder or converted into a canal. Can any reasonable man contend that the private advantage, which was the inducement to the dedication in the one case, has been realized, or that the benefits assessed in the other, are a just compensation for the new burden imposed?[2] Such a conclusion would be repugnant to common sense and natural equity. We shall assume therefore, that there are certain implied restrictions upon the uses to which streets may be put by the public.[3]

(3). *Nature of Abutting Owner's Interes in Streets.*—The right to insist that the public shall not transcend these limitations, is the property of the abutting owner, and is as much within the protection of the constitution as any other species of property known to law.[4]

(4). *Immaterial whether City Owns Fee or Easement.*—Questions growing out of the nature of the public interest in streets, have been purposely passed over. Whether it be

1 Cooley Const. Laws, p. 570; Dillon Mun. Corp. sec. 625; Springfield v. Schmook, 68 Mo. 394; Story v. N. Y. E. R. Co. 15 Cent. L. J. 391; Symonds v. Cincinnati, 14 Ohio 147, 5 Ohio St. 140; Ford v. R. Co., 14 Wis. 616; Pomeroy v. R. Co., 16 Wis. 640, 58 Mo. 491.

2 Williams v. N. Y. Cent. R. Co. 16 N. Y. 97 (57).

3 Cooley Const. Lims. 548; Boston v. Richardson, 13 Allen, 146; Lexington R. Co. v. Appelgate, 8 Dana, 289; Griffin v. Martin, 7 Barb. 297; Milhan v. Sharp, 15 Barb. 201; Craig v. R. Co. 39 Barb. 494, Davis v. Mayor of New York, 14 N. Y. 509; Williams v. N. Y. Cent. R. Cent. R. Co., 16 N. Y. 97; Bloomfield Gas. Lt. Co. v. Calkins, 62 N. Y. 386, 39 N. Y. 404; 25 Wend. 462, 3 Hill, 567, 25 N. Y. 526; Hinchiman v. P. Horse R. Co., 17 N. J. Eq. 75, 5 Dutcher 206; Starr v. C. & A. R. Co., 25 N. J. L. 599; State v. Lavarock, 34 N. J. L. 207; Street R. Co. v. Cumminsville, 14 Ohio St. 523; Imlay v. Union Br. R. Co. 26 Conn. 256; R. Co. v. Harbley, 67 Ill. 439; City of Morrison v. Hinkson, 87 Ill. 587; Kuckeman v. R. Co., 46 Iowa, 366; Kimball v. Kenosha, 4 Wis. 330; R. Co. v. Reed, 41 Cal. 256; Schurmerer v. R. Co. 10 Minn. 821; Barney v. Keokuk, 94 U. S. 324; *Contra* People v. Kerr, 27 N. Y. 188; Philadelphia v. Trenton R. Co., 6 Whart. 25, 73 Pa. St. 29.

4 Story v. N. Y. E. R. Co., 15 Cent. L. J. 391; Lexington R. Co. v. Applegate, 8 Dana, 289; Houston v. Odum, 53 Texas, 343; 17 N. J. Eq. 75; Crawford v. V. of Delaware, 7 Ohio St. 459; Street R. Co. v. Cumminsville, 14 Ohio St. 523; *Contra*, 6 Whart. 25, 7 Barb. 508, 16 N. Y. 97, 50 N. Y. 206.

an easement or fee is immaterial.[5] If it be an easement, *ex vi termini*, certain restrictions are assumed. An easement is the right to do some things on or over the property of another. By necessary implication, the right to do other things is precluded. On the other hand, if the public own the fee of the land over which the street runs, it is held in trust for certain uses and no others,[6] and these uses are those to which streets are usually put, or such as were fairly within the contemplation of parties at the time of the appropriation. The compensation made to the owner is estimated on this presumption, since the benefits assessed against him are predicated upon the uses to which streets are usually put. Any use, destructive of or incompatible with these ordinary uses, is also destructive of the benefits assessed, and is to this extent a taking without compensation.

This position is not inconsistent with the right of the State in the exercise of its Eminent Domain, to appropriate private property absolutely, whenever the public safety, welfare or convenience may demand. It is assumed only that where property is taken for a street, and the compensation therefor is made with a view to this use only, the street may not afterwards be converted into a canal. A new condemnation, with provision for additional compensation, proportionate to the damage inflicted, will authorize any public use whatsoever.

(5). Constitutional Provisions—Taking—Damaging.—It may be well here to touch upon another question involved in this discussion, which has caused great embarrassment to the courts, and is still surrounded with difficulties. Many of the courts assert that an injury to the enjoyment of abutting property by any particular use of the street, is a damage and not a taking within the meaning of the constitution. They construe taking to be the actual appropriation of property to the beneficial use of the public, or such a physical invasion thereof, as amounts to such appropriation. Any consequential injury suffered by an abutting owner, is a damage authorized by law, for which no compensation is required to be made, that is, *damnum absque injuria*.[7] The Supreme Court of Pennsylvania cites with approval, as illustrative of the difference between damaging and taking—a case where a ferry, destroyed by cutting off access to the shore, was held to be damaged and not taken.[8] Such a theory is palpably unjust in practice, and we believe, without foundation in law. What matters it to the individual whether his property be taken from him or its use and enjoyment destroyed, whether the injury suffered be consequential or direct? Wherein lies the value of property, except in the use of it? If a man own a house in town whose value depends upon its accessibility and the light and air received over a street, his property is as effectually destroyed by the erection of a market-house against his doors and windows, as by its actual appropriation to such a use. In the one case his house is taken from him, in the other, it is converted into a well.[9]

The theory can not be maintained in law, if it is admitted that the public have a qualified right only in the streets. What remains over and above such right is the property of the abutting owner, any interference with or appropriation of such property is as much a taking, as if a physical material thing were taken.[10] That the theory is repugnant to the common sense of the people is shown in the recent Amendment to Constitutions made after some flagrant acts of injustice done under cover of this distinction and permitted by the courts. Several constitutions now provide

[5] Cooley Const. Lims. 555; Dillon Mun. Corps. sec. 688; People v. Kerr, 37 Barb. 391, 14 Ohio St. 523; 87 Ill. 589; Kimball v. Kenosha, 4 Wis 330; Barney v. Keokuk, 94 U. S. 324; Transportation v. Chicago, 99 U. S. 635; *Contra*, Dillon Mun. Corp. sec. 704.

[6] Story v. N. Y, E. R. Co., 15 Cent. L. J. 391; Schurmeirer v. R. Co., 10 Minn. 82, 7 Wall. 289, 4 Wis. 330; State v. Lavarock, 34 N. J. L. 201; Imlay v. Union Br. R. Co.. 26 Conn. 256; City of Morrison v. Hinkson, 87 Ill. 587.

[7] Philadelphia v. Trenton R. Co. 36 Am. Dec. 202; Chicago v. Rumsey, 87 Ill. 348; Murphy v. Chicago, 29 Ill. 279, 49 Ill. 484, 56 Ill. 132. 57 Ill. 29; 63 Ill. 519; 65 Ill. 518, 71 Ill. 616; Hatch v. R. Co., 25 Vt. 66, 99 U. S. 635, 102 Ill. 64.

[8] Philadelphia v. Trenton R. Co., 6 Whart. 25.

[9] Cooley Const. Lims., 544; St. Louis v. Gurna, 12 Mo. 414, dissenting opinion Birch, J.; G. C. &. S. Fe R. Co v. Eddins, S. C. Texas, 1884; Hooker v. R. Co., 14 Conn. 146; Eaton v. R. Co. 51 N. H. 504; Nevins v. Peoria, 41 Ill. 502; Rigney v. Chicago, 102 Ill. 64; Bigelow v. R. Co., 27 Wis. 478; Driver v. R. Co. 32 Wis. 569; 25 Kas. 588: Ashley v. Port Huron, 35 Mich. 296; S. C. R. Co. v. Steiner, 44 Ga. 546; Pumpelly v. Green Bay Co., 13 Wall. 175; Lackland v. N. M. R. Co., 31 Mo. 180.

[10] Street R. Co. v. Cumminsville, 14 Ohio St. 523, etc., see note 4.

that property shall neither be taken nor damaged without compensation.[11]

For the foregoing reasons it is assumed that the right of the public in city streets is qualified and that any use of such streets, injuriously affecting the enjoyment of abutting property, for which the owner has not been justly compensated, is a new taking within the meaning of the constitution.

(6). Extent of Cities Property in Streets.—It remains to determine the extent of the public right in the streets of cities, or what uses thereof by the public are presumed to be within the contemplation of parties at the time of their appropriation. The public right is limited to the uses to which streets are usually put, and to those to which they ought to be put. When a use is well known to all the parties interested, the dedication or condemnation will be presumed to have been made with reference to such use, and the benefits and damages should be estimated accordingly. Where a new use is sought to be made of a street, the first question is whether or not such use is one to which streets ought to be put, or is compatible with the ends in view when the street was established.[12] Streets were undoubtedly established to facilitate travel and transportation in the modes known at the time of their appropriation. Whatever would interfere with or obstruct travel in these modes is obviously the conversion of the road to a new use and unless authorized by law is a public nuisance. Where such new use is an improved mode of travel and transportation, authorized by law, the public may not complain even if it interfere to some extent with the other usual modes. The State has absolute control of its highways and what it authorizes to be done upon them, can not be considered a public nuisance. If, however, the new use in the slightest degree impairs the enjoyment of abutting property, whether by obstructing free access to it, or making it less fit for the uses to which it might be put, the rights of the individual are involved, and such right may not be infringed, without the just compensation provided by the constitution. Where the injury is so slight as to be unworthy of consideration, the maxim *de minimis non curat lex*, may be invoked to avoid vexatious litigation, but where a substantial damage is suffered by reason of such new use, the question is as to the *quantum*[14] and not as to the right of compensation. Nor will any supposed or real benefit or advantage resulting to the public at large, from the new use excuse the damage to the individual. What the public requires, it must pay for.[16]

This position is condemned by many of the courts[17] but is supported by others of equal authority and we believe, with better reason.[18]

As already stated, whether streets be dedicated or condemned, the private benefit is a very important consideration. In one case it is the motive which induces the appropriation; in the other it is assessed against the individual in estimating the compensation to be made him. This private benefit depends on the uses to which streets may be put. If uses known at the time of the appropriation are permitted, the abutting owner can not complain, but if a new use which injuriously effects the enjoyment of his property, is to be tolerated *pro tanto*, the consideration which induced the appropriation of the street, fails.

III.

ILLUSTRATIONS.

(1) *Preliminary.*—There is little difficulty in applying the heretofore stated principles to particular cases. It seems that anciently, highways were divided into several classes, according to the particular uses to which they might be put, that is into *iter*—foot-way,—*actus*—foot and horse-way,—*via regia*—foot horse and cart way,—and *communis strata*.[19] In these old distinctions may be found the germ of that right which it is the purpose of this article to vindicate. When a man's land was charged with one use, it was unlawful

[11] Present Constitutions Illinois, Missouri, etc.

[12] Story v. N. Y. etc. R. Co., 15 Cent. L. J. 391; Milhan v. Sharp, 15 Barb. 201; Dillon Mun. Corps Sec. 704, 18 Barb. 222, 26 Conn. 255.

[13] Randle v. Pac. R. Co., 65 Mo. 325.

[14] Cooley Const. Lims., 548, 34 N. J. L. 201, etc. *ante*.

[15] Cooley Const. Lims., 552.

[16] Lexington R. Co. v. Applegate, 8 Dana 289; O'Brien v. City of St. Paul, 25 Minn. 331; McCombs v. City of Akron, 15 Ohio 474; 13 Wal. 175.

[17] Transportation Co. v. Chicago, 99 U. S. 635; Stormfaltz v. Maaor T. Co., 13 Pa. St. 559; O'Connor v. Pittsburg, 18 Post 187; Commonwealth v. N. etc. R. Co., 27 Pa. St. 339; State v. Dawson, 3 Hil 1 Murphy v. Chicago, 29 Ill. 279.

[18] Ante notes, 9 and 14.

[19] Bacon's Abr. Highways.

to enlarge this use to his prejudice. At common law the right of the public in a highway was to pass and re-pass at pleasure. Except this easement it had no right whatever. The soil of the highway, belonged to the abutting owners who were entitled to all the profits of it, as trees crops, and mines.[20] This is substantially the law of our own country. Accordingly it has been held that the Legislature of a State may not authorize the inhabitants of counties to graze their cattle on the highways. Nor a company to lay gas pipe under its surface. Nor to do anything else, in enlargement of the public easement without providing for public compensation to the abutting owners.[21]

(2) *Gas and Water Pipe—Sewers.*—The inconvenience of restricting the public easement in city streets to a right of passage merely, soon became apparent. Such a rule precluded the use of streets, for gas and water pipe and sewers, when these necessities could be placed nowhere else with equal advantage. The easement was accordingly enlarged.[22] The abutting owners acquiesced in the usurpation in view of their own private advantage, each having an equal interest with the public in the proper lighting, watering and drainage of the city. Moreover, they suffered no inconvenience whatsoever by reason of the new use. Beyond these uses and those of a kindred nature, causing a greater inconvenience to the abutting owner, the public easement cannot fairly be extended.

(3) *Steam Railways.* — Steam railroads, therefore, are new burdens. They are not ordinary modes of using streets, contemplated by the parties. They seriously injure the enjoyment of abutting property. They are dangerous and noisy and emit smoke and create dust and shake the foundations of buildings and obstruct the ree use o the highway in the ordinary ways and free access to abutting property.[24] Where land is condemned for a railroad, the compensation made is estimated on the value of the land taken and the damage to the land left by reason of the proximity of the road. No allowance is made for supposed benefits. A street, however, may be condemned without any compensation whatever, as already stated, on the theory that the benefits equal the damages. Its appropriation to a railroad, therefore, can be regarded in no other light than as a new taking.

(4) *Street Railways.*—A street railroad on contrary is not a burden on a highway. It is an improved mode of using the street for the purpose contemplated. It relieves traffic, adds to the efficiency of public thoroughfares and need not in the least interfere with the enjoyment of the abutting property.[25]

(5) *Telegraph and Telephone Wires.*—Telegraph poles and lines, we believe to be additional burdens which may not be placed in the public streets without compensation to the abutting owner. Where the poles are far apart and one or two wires only are strung upon them, the injury to the abutting owner may be merely nominal, and as *de minimis non curat lex* an action to restrain their erection unless compensation be made, might not lie, although a contrary ruling, would seem to be more consistent with a nice regard for private right. Where, however, as is frequently the case in large cities, telegraph poles support from fifty to a hundred wires, forming an almost impenetrable network, in front of adjoining buildings, they cannot but be regarded as serious nuisances to the abutting owner. To some extent they obstruct the light and ventilation of his windows, and in case of fire might prove to be inconvenient in the highest degree. Under such circumstances it cannot be denied that they damage

[20] Galbraith v. Armour, 4 B e .

[21] Griffin v. Martin, 7 Barb. 297, 11 Barb. 392, 3 Wend. 147, 3 John 263, 8 Wend. 107; Milhan v. Sharp, 15 Barb. 201; B. Gas Co. v. Calkins, 62 N. Y. 386.

[22] Dillon on Mun. Corps. sec. 688; Milhan v. Sharp, *ante*; Henkman v. Horse R. Co., 17 N. J. Eq., 75.

[23] State v. Lavarock, 34 N. J. L. 201.

[24] Cooley Const. Lims. 547, Dillon Mun. Corps. sec. 704; Davis v. Mayor of New York, 14 N. Y. 507; Craig v. R. Co., 39 Barb. 494; Williams v. R. Co., 16 N. Y. 97; Wagner v. T. N. R. Co., 25 N. Y. 526; B. Gas Co. v. C., 62 N. Y. 386; Hinkman v. R. Co., 17 N. J. Eq. 75; Starr v. R. Co., 24 N. J. L. 599; Eaton v. R. Co., 51 N. H. 504; Imlay v. R. Co., 26 Conn. 256; Elliott v. R. Co., 32 Conn. 580; R. Co. v. Steiner, 44 Ga. 546; R. Co. v. Hartley, 67 Ill. 439; Cox v. R. Co., 48 Ind. 178; Kucheman v. R. Co., 46 Iowa 366; R. Co. v. Reed, 41 Cal. 256; R. Co. v. Schumeirer, 7 Wall 289, 48 Ind. 178; *contra* 33 Am. Dec. 497, 55 Ala. 413, 7 Barb. 508; *contra* 18 Barb. 222, 50 N. Y. 206, 73 Pa. St. 29, 29 Ill. 279, 65 Mo. 325.

[25] Milhan v. Sharp, 15 Barb. 201; R. Co. v. R. Co., 33 Barb. 421; People v. Kerr. 37 Barb. 391; R. Co. v. R. Co., 34 N. J. Eq. 164; Street R. Co. v. Cumminsville, 14 Ohio St. 523; Elliott v. R. Co., 32 Conn. 580; R. Co. v. Steiner, 44 Ga. 546; Peddicord v. R. Co., 44 Md. 463; Barney v. Keokuk, 94 U. S. 324, *contra* Craig v. R. Co., 39 Barb. 494, 62 N. Y. 386.

the abutting property. Moreover, they are not a proper use of a highway as such. They in no way facilitate travel or traffic and can not fairly be held to be within the contemplation of parties at the time when streets are appropriated. It is asserted, however, that they are public necessities, and that like water and gas pipes they can be placed nowhere so conveniently as in the streets. Granting so much, they differ from these latter public conveniences, in that they injuriously affect the enjoyment o th. ..utting property. When it becomes possible to put wires under ground, the injury ceasing, the right to compensation ceases. As already stated, the public convenience does not authorize an injury to the individual without compensation. Steam railroads are public necessities and can be placed nowhere so conveniently as in public streets, yet they are held to be additional burdens. For these reasons we are inclined to hold that telegraph poles and wires, are burdens upon streets, for which additional compensation must be made to the abutting owner. The difficulty of estimating the damage suffered does not affect the right to compensation; it affects the *quantum* only. We are aware that the great weight of authority is against this position.[26]

St. Louis, Mo. ISAAC H. LIONBERGER.

[26] Dillon on Mun. Corps sec. 698, and authorities cited; Gay v. Mutual Union Telegraph Co., 12 Mo. Ap.; *contra* Board of Trade Telegraph Co. v. Barrett, 107 Ill. 507 (1884); 47 Am. Rep. 458. The Superior Court of New York has in its late decision in Metropolitan Telephone and Telegraph Co. v. Colwell Lead Co., 1 Am. L. J. 316, (Aug. 12, 1884) supported our position that the legislature has no power, so far as the rights of abutting owners are involved, to authorize the use of the streets of the city of New York for the erection of poles to conduct telegraph and telephone wires, the legislative authority over the streets being limited to a regulation of use for which the streets are held by the city in trust, which is to appropriate and keep them open as public streets; and such erection of telegraph poles is not a street use and does not come within the terms of the trust. A telegraph company cannot, therefore, invoke the equitable power of the court to restrain interference by abutting owners with its poles in city streets, even though its lines have been erected under legislative sanction.

PRESUMPTIONS IN PARTNERSHIP LAW AS TO ALLOWANCE OF INTEREST AND COMPENSATION, SHARES AND LIABILITY OF INCOMING PARTNERS.

1. Preliminary Observations.
2. As to Allowance of Interest.
3. As to Allowance of Compensation to Partner.
4. As to Shares in Profits, Losses and Property.
5. As to Liability of Incoming Partner.

(1). Preliminary Observations.—It is always perfectly competent for persons forming co-partnerships to expressly agree as to all their several rights and obligations. This, however, they not infrequently neglect. And as long as individuals, from careless business habits, or from improvident, indiscreet confidence in their associates, enter into such relations without express understanding as to any or many of the rights to be claimed and the liabilities to be assumed, there will be cause for important and delicate inquiry into the legal presumptions which attend them in the final adjustment of their accounts. Some of these presumptions it is proposed to consider.

(2). As to Allowance of Interest.—The general doctrine is well established that in the absence of express stipulation no interest will be allowed on partnership shares;[1] nor is a partner chargeable with interest on balances and over drafts except by agreement.[2] These general principles, however, have by no means been applied with invariable severity. In many instances, the equitable conscience of the courts has laid them aside and rendered a contrary decision when the peculiar circumstances of the case seemed justly to demand it. Although in the attempt to formulate the exceptions with some degree of accuracy, minor but irreconcilable differences have arisen—differences which in a general treatment of the subject, it would certainly be tedious and perhaps unprofitable to discuss; yet the same idea appears to have dominated the minds of the various courts in determining what facts would render a case exceptional and exempt it from the application

[1] Desta v. Smith, 20 Ala. 747; Dexter v. Arnold, 3 Mas. 284; Miller v. Lord, 11 Pick. (Mass.) 11; Moss v. McCall, 75 Ill. 190; Pearce v. Pierce, 77 Ill. 284; Tutt v. Land, 50 Ga. 339; Jackson v. Johnson, 18 Sup. Ct. N. Y. 509.

[2] Brown's Estate, 11 Phila. (Pa.) 127.

of the rule. Accordingly, where one of the partners, of his own motion, advanced a large sum to save the firm from insolvency and foreclosure;[3] and where partners agreed to invest an equal amount of capital, and one furnished for the use and benefit of the co-partnership a sum exceeding his agreed proportion;[4] interest was allowed on the advance and the overplus. When the books of a firm show an allowance of interest on yearly balances, it is also presumed that such entries were made with the assent of all the partners.[5] But it seems that this latter presumption will be removed and the case determined by the general rule, where the partner claiming the interest has had the charge and keeping of the books.[6] The principle of the exceptions does not appear to admit of very exact or specific statement; but in general, whenever it can be collected from the particular circumstances or from the usage and dealing between the parties, that there ought to be or was intended to be such a computation of interest, the courts will allow it.[7] A similar doctrine of exception prevails in regard to charging interest against a partner upon unpaid balances and overdrafts.[8] And indeed, so much laxity in expounding this doctrine of interest has obtained in the later jurisprudence, that some of the most approved text-writers and learned courts have declared the ancient rule to be now deserted, and that the allowance of interest must depend upon the circumstances of each particular case.[9]

(3). As to Allowance of Compensation to Partner.—An express agreement must be proven in order to entitle a partner to compensation for services rendered the firm.[10] But where an agreement to compensate may be fairly implied from the course of dealing between the partners,[11] or where from the attendant circumstances an intention to remunerate the partner rendering the extra service may be inferred,[12] an express stipulation to that effect is unnecessary.[13]

(4). As to Shares in Profits, Losses and Property. It is presumed in the absence of any agreement, that the members of a co-partnership are to share profits and bear losses equally;[14] and an equal participation in profits, presumes an equal bearing of losses.[15] It has also been said that upon dissolution and settlement the partnership property will be equally divided, unless an agreement to the contrary be proven.[16] But this language, it is believed, is certainly subject to qualification. If it were an ascertained fact that one partner furnished all or a greater part of the capital, and if it further appeared that the agreement provided only for an equal sharing of the profits and assumption of the losses, without any provision for disposing of the remaining assets—would the law then presume that such surplus should be distributed in equal proportions? The contract is silent upon this subject. With respect to the point considered, there is "absence of agreement;" though there is evidence to show the amounts actually invested by the various co-partners. There can be no doubt that the language referred to, and to be found in some of the decisions, is too broad and general in its character. If the testimony failed to disclose the comparative original investments of the parties, the presumption as to equal division would apply. Otherwise, whatever may be the agreed or presumed ratio for distributing profits and bearing losses, the capital constitutes a debt

[3] McMillan v. Janus, 105 Ill. 194.

[4] Reynolds v. Mardis, 17 Ala. 32; Baker v. Mayo, 129 Mass. 517.

[5] Pratt v. McHatton, 11 La. Ann. 260.

[6] Mourain v. Delamere, 4 La. Ann. 78.

[7] Morris v. Allen, 1 McCar. (N. J.) 44; Miller v. Craig, 6 Beav. 433; Hodges v. Parker, 17 Vt. 242; Pond v. Clark, 24 Conn. 370.

[8] Coddington v. Idell, 30 N. J. Eq. 540; Crabtree v. Randall, 133 Mass. 552; Honore v. Calmesnil, 7 Dana (Ky.) 177.

[9] *Vid.* 2 Lind. Part 786; Gyer's Appeal, 62 Penn. St. 73; s. c. 1 Am. Rep. 382.

[10] Reybold v. Dodd, 1 Harr. (Del.) 401, s. c. 26 Am. Dec. 401; Lyman v. Lyman, 2 Paine 11; Butter v. Lemby, 5 Jones (N. C.) Eq. 148; Vanduzer v. McMillan, 37 Ga. 299; Lee v. Lashbrooke, 8 Dana, (Ky.) 214; Cunliff v. Dyerville, etc. Co. 7 R. I. 325; Anderson v. Taylor, 2 Iredell's Eq. 420; Drew v. Ferson, 29 Wis. 620; Bennett v. Russell, 34 Mo. 524; Stebbins v. Willard, S. Ct. Vt. 1881, 12 Rep. 766; Godfrey v. White, 43 Mich 171; Mann v. Flanagan, 9 Oreg. 425.

[11] Caldwell v. Leiber, 7 Paige (N. Y.) —

[12] Cramer v. Bachman, 68 Mo. 310.

[13] Bradford v. Kimberly, 3 Johns. Ch. 431; Marsh's Appeal, 69 Pa. St. 30.

[14] Smith v. Ullman, 14 Rep. 657; Peacock v. Peacock, 16 Sum. Ves. 49; Stewart v. Forbes, 1 Mc N. & G. 137; Collins v. Jackson, 31 Beav. 645.

[15] Monroe v. Whitman, 15 N. Y. Sup. Ct. 553;

[16] 5 Waite's actions and defenses 118, citing Moore v. Bare, 11 Iowa 198; Farr v. Johnson, 25 Ill. 522; Gould v. Gould, 6 Wend. 263; *Vid* also Stein v. Robertson, 30 Ala. 286; Roach v. Perry, 16 Ill. 37; Wolf v. Gilmer, 7 La. Ann. 583; Griggs v. Clark, 23 Cal. 427.

of the firm and is payable out of its assets.[17]

(5) *As to liability of Incoming Partner.*—An incoming partner will not be liable for firm debts previously contracted unless he expressly assumes them.[18] What will amount to such an assumption, is not so well settled. On the one hand, it has been decided that even where the incoming partner has by express stipulation undertaken to share the liability for prior debts, this will not warrant creditors in suing him, unless arrangements with the creditors themselves be proven and founded on a sufficient consideration.[19] On the contrary, where a firm was increased by the acquisition of a new partner, mere silence on his part and failure to notify the creditor that he would not consent to the renewal of a note given originally by the old firm, when he knew that negotiations were in progress looking to such renewal, was held to justify the finding by the trial court of an assumption of the debt by the incoming partner; and this, though he did not sign the note himself and was not present when it was signed. In this case it further appeared that there had been no change in the firm name.[20] These two decisions may be taken as representative of the extremes upon this important question. They are obviously and hopelessly antagonistic. The one interprets the general rule with severity, and restricts the parties plaintiff to proof of privity between themselves and the new firm. The other infers an assumption of the debt from the incoming partner's silence and failure to object to a renewal of the obligation. The one requires proof of a direct agreement with the new partner, founded on a sufficient consideration, in order to subject him to the liability. The other requires under the circumstances, a disclaimer from the new partner in order to avoid the liability. A more conservative doctrine is the better doctrine. In order to make incoming partners responsible for pre-existing debts, there must be the concurrent consent of the creditors, the old firm and the new.[21] Such concurrence on the part of the incoming partner may doubtless be inferred from his conduct; but it is believed that the best considered cases would require such conduct to clearly indicate an intention to assume the debts, before the inference would be warranted. If the conduct were open to any other explanation or hypothesis, it ought to be submitted as a matter of fact to the jury.

The question of consideration has been regarded as one of difficulty. The tripartite agreement is of such a nature that the well-established common law principle of contracts makes the mutual undertakings of the parties a consideration, each for the others. True, it is often impracticable to have an oral or written agreement made, in which all three parties actually join; but when the contract under which the debts are assumed has been duly entered into by the old and new firms, the creditors may ratify and adopt it by demand of payment or action brought.

Kansas City, Mo. R. E. B.

[17] Baker v. Mayo, 129 Mass. 517; Whitcomb v. Converse, 119 Mass. 38, s. c., 20 Am. Rep. 311; Lewis v. Harrison, S. Ct. Ind. XII Cent. L. J. 527; Livingston v. Blanchard, 130 Mass. 341; 2 Lind on Part. 675, *et seq*

[18] Wright v. Brossean, 73 Ills. 381; Fuller v. Rowe, 59 Barb. (N. Y.) 344; Spaunhorst v. Link, 46 Mo. 197; Sternberg v. Calanan, 14 Iowa 251.

[19] Morehead v. Wriston, 73 N. C. 398.

[20] Cross v. Burlington Nat. Bank, 17 Kans. 336—citing Updike v. Doyle, 7 R. I. 447; *Ex parte* Jackson, 1 Ves. Jr. 131; *Ex parte* Peele 6 Ves. Jr. 601.

[21] Fagan v. Long, 30 Mo. 222; Patterson v. Camden, 25 Mo. 13; Hicks v. Wyatt, 23 Ark. 55; Hver v. Norton 26 Ind. 269; Meador v. Hughes, 14 Bush. (Ky.) 652; Wheat v. Hamilton, 53 Ind. 256.

[22] Clark v. Fletcher, 96 Pa. St. 416.

SURETYSHIP—EXTENSION—DISCHARGE.

RIDDLE v. THOMPSON.

Supreme Court of Pennsylvania.

A and B assigned a judgment to C, and "guaranteed" its payment within one year. *Held*, that the assignors were sureties and not guarantors, and hence the assignee having extended the time of payment, without the consent of the assignors, the sureties were discharged.

Error to the Common Pleas of Butler County.

Assumpsit, by Samuel L. Riddle, Sr., against Josiah M. Thompson, S. R. Thompson, John C. Martin, and Allen Wilson. Pleas, non assumpsit and special matter in affidavits of defence.

John M. Thompson was committee of H. P. Sheakley, an habitual drunkard. He had given bond for the faithful discharge of his trust, with the defendants and Daniel Fielder as his sureties. On January 3, 1877, a judgment was entered, by confession, in favor of the above defendants against Thompson, in the sum of $15,000, to indemnify them against loss on account of their suretyship. Thompson was insolvent. A new

committee was appointed, *vice* Thomson, and proceedings were instituted to compel Thompson to pay over the money which his account showed to be in his hands. An application was made to Samuel L. Riddle, by Thomson and the attorney for Allen Wilson, to furnish the money necessary to stop the proceedings in the matter of the Sheakley estate. Riddle furnished the $15,000 and took an assignment of the indemnity judgment before mentioned. The assignment (after the caption of the judgment) was in these words:—

"For value received we assign this judgment to Samuel L. Riddle, Sr., and guaranty payment thereof in one year from this date, January 8, 1878.

JOSIAH M. THOMPSON,
SOLOMON R. THOMPSON,
ALLEN WILSON,
JOHN C. MARTIN,

Witness: JOHN M. THOMPSON."

On April 22, 1879, this judgment, per paper filed signed by W. H. H. Riddle, attorney for plaintiff, and John M. Thompson, was revived by amicable *scire facias*, and liquidated at $16,160, with interest from April 22, 1879 (interest calculated from January 8, 1878, and included in new principal). "One half thereof due January 8, A. D. 1879, and the other half due January 8, A. D. 1880." Riddle in his testimony said that Thompson and the attorney for Allen Wilson got him to agree that one-half of the money should be paid in one year, and the other half in two years, at the time he took the assignment and guarantee of the judgment. But this was not then in writing, nor was there any allegation that the attorney for Allen Wilson represented either of the three parties who are defendants in error. None of the guarantors gave their consent or had notice of the extension. Verdict was entered below for defendants below, on the ground that they were sureties, and were discharged.

PER CURIAM:

While there is a radical difference between the liability of a surety, and one who assumes a collateral obligation to guarantee the payment of the debt of another, yet the language of the agreement which shall constitute the one or the other, has not always been clearly defined by the authorities. In the present case we think the language used made the defendants in error sureties. They agreed the judgment should be paid at a time specified. On failure of the principal debtor to pay then, the obligation of the defendants in error to pay became absolute. The assignee could proceed against them at once. He was not required to pursue the original principal debtor to insolvency, nor even to issue execution against him. The plaintiff in error clearly extended the time of payment. He arranged with the defendant in judgment whereby the latter confessed a revival of the judgment with the extension of time incorporated therein. The confession of revival was a sufficient consideration for the extension of time therein agreed to be given. Had execution issued before the expiration thereof, it would have been set aside on motion of the defendant in the judgment. The learned judge ruled the case correctly.

Judgment affirmed.

DAMAGES — WRONGFUL DISHONOR OF CHECKS — ELEMENTS — SPECIAL DAMAGE.

BIRCHALL v. THIRD NAT. BANK.

Court of Common Pleas, Philadelphia, June 17, 1884.

A bank is liable in temperate damages to a customer for wrongful dishonor of his check without proof of special damages.

Sur rule for new trial.

Defendant dishonored two of plaintiff's checks for the aggregate sum of $318, while he had $600 in the bank to his credit, and the bank held none of his paper. The defendant gave him a letter to show to the banks which had presented the checks, and those who would have known it, which stated that the error was due to a clerk's miscalculation, and that they regretted the affair, and that the plaintiff's credit had always been high. He nevertheless brought this action for damages.

HARE, P. J., charged the jury as follows:

Inasmuch as the bank has the use of the money it undertakes a duty. When there is evidence that there is enough deposit to meet a check drawn, and such check was not paid on presentation, and no sufficient explanation is given for non-payment, there is sufficient for a jury. The difficulty is not so much whether the bank is liable, but as to the measure of damages. If there were anything to indicate that the conduct of the bank was wilful, or that it delayed to make the reparation, such as it could make, there, undoubtedly, another element would arise for the jury to mulct the bank; but there is no such case here, as it shows that there was an innocent mistake from the fault of a clerk, who in adding up the account carelessly omitted a figure, and this result happened. I do not know, therefore, that there is any allegation that there was any gross negligence, and if that be so, the question is what injury has the plaintiff sustained that would justify the jury to set the amount down in figures that he ought to receive to set the matter straight. The mere fact that he was obliged to bring suit, if he ought to obtain any compensation; the mere fact that he was disturbed in his business might be reason to apply to the jury to give him compensation for it; but the serious question is, what is this injury, the real harm he suffered? It has been said that the smaller the check the greater the injury; I confess it does not strike me in that light, it is altogether a question of circumstances.

The jury returned a verdict of $1,000 for plaintiff, but the court said the motion for new trial would be overruled if a *remittitur* of $400 was filed by the plaintiff.

DAMAGES FOR WRONGFUL DISHONOR OF CHECKS.

I. *Foundation of the Right of Action.*—The relation between a bank and a depositor is that of debtor and creditor. The bank is under obligations to pay the money on deposit to the depositor whenever called upon to do so, and it is the right of the depositor to have such payment made. Their rights in this respect are reciprocal. The bank upon receiving the money of its customer assumes a legal responsibility. It undertakes to honor all checks, drafts and orders of the depositor when in funds to meet them, and which are not subject to any prior lien of the bank. This obligation is incurred by the simple act of receiving the deposits as a consideration for the right to employ the money.

This duty arises from the implied contract between the bank and customer, and necessarily results from the usual course of the banking business.[1] And this right of the customer to have his checks honored is so far substantial that if the bank refuses to pay them without a justifying cause, an action for damages will lie.[2] The sole act of refusal to honor the check is sufficient to maintain the action. And on this principle an agent who has put to his private account funds of an undisclosed principal, is entitled to recover damages, although the agent has improperly obtained them.[3]

II. *Measure of Damages.* In this kind of cases the difficulty is not so much whether the bank is subject to an action, but as to the measure of damages.[4] The bank by improperly dishonoring the check, has committed a breach of duty, and its liability to an action is undoubted.[5]

In all cases the depositor may recover nominal damages, whether he alleges and proves special damages or not, and to recover more, it has been held in some of the earlier cases, that he must show that he has suffered a perceptible and measurable loss.[6] The case of a trader seems to be an exception to this principle.[7] For when it is shown that the plaintiff is a trader, the jury in estimating the damages may take into consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of the contract; "just as in the case of an action for slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader the action lies without proof of special damage."[8]

It can hardly be possible that a customer's check can be improperly dishonored without some slur to his business standing. His credit is impugned. He is held out before the business world as unable to meet his money obligations. It is a serious impeachment of his financial capacity. "The whole commercial community," says Johnson, J., "and every interest dependent upon commerce (and that is every interest in the civilized world) is affected."[9] Hence, it is the duty of judicial tribunals to hold banks to the exact and unvarying performance of punctuality towards customers.

If the plaintiff can, he may allege and prove special loss, but if he is unable to do so, the jury should be instructed to give such temperate damages as they shall judge to be a reasonable compensation for the injury the plaintiff must have sustained from the dishonor of

[1] Downes v. Phoenix Bank, 6 Hill 297; Marzetti v. Williams, Barn. and Ad. 415; Watson v. Phoenix Bank, 8 Met. (Mass.) 217; Byles on Bills, (Sharswood's edition), p.* 18 and notes. In Fogarties v. The State Bank, 8 American Law Reg. (O. S.) 393, (1860), in referring to the duty of banks, Johnson, J., remarked: "In the best conducted banking institutions the custom is this: When a customer deposits funds, the bank is understood to receive them with a tacit engagement to pay them out on his order, or check drawn in his own favor, or in favor of third persons with whom he may have dealings. This is understood to be the bankers duty and engagement, incurred by the simple act of receiving the deposits as a consideration for its right to employ the money, and which it is to perform, upon the single condition of being notified of the existence of the check, in such manner as to free it from danger of being liable to pay the same amount twice, that is to say the checks take precedence according to the order of notification.

[2] Morse on Banks and Banking, (2nd ed.) 520; Grant on Bankers and Banking, 45; Whitaker v. Bank of England, 6 Car. and P. 700, (1835); 1 C. M. and R. 744; Rolin v. Steward, 14 C. B. 595 (1854); S. C. 23 L. J. (C. P.) 148; 78 E. C. L. R.; Watts v. Christie, 11 Beaven, 546, (1849); Boyd v. Fitt, 14 Irish Common Law, (N. S.) 43 (1862). In Birchall v. Third National Bank, 15 W. N. C. 174, Hare, P. J., in charging the jury observed: "Inasmuch as the bank has the use of the money, it undertakes a duty. When there is evidence that there is enough deposit to meet the check drawn and such check was not paid on presentation, and no sufficient explanation is given for non payment, there is sufficient for the jury."

[3] Tassell v. Cooper, 7 C. B., 509 (1350); S. C. 9 Man., Granger v. Scott.

[4] Birchall v. Third National Bank, 15 Weekly Notes of Cases, 174 (1884).

Rolin v. Steward, 14 C. B., 595, (1854) is the leading English case; Saylor v. Bushong, 100 Pa. St. (4 Outerbridge) 27 (1882); National Machine Bank v. Peck, 127 Mass. 298 (1879). In he last case Gray, C. J., said (p. 300); "So long as the balance of account to the credit of the depositor exceeds the amount of any debt due, and payable by him to the bank, the bank is bound to honor his check, and is liable to an action by him if it does not." See further 1 Sutherland on Damages, 129 and 497; 1 Sedgwick on Damages, (7th ed.) p. 520 and note (a); Daniels on Negotiable Instruments (3d ed.) § 1642, p. 656; 2 Parsons on Notes and Bills, pp. 63–64 and notes. The bank is merely a debtor to the depositor to the amount deposited. Foley v. Hill, 1 Phillips, 399 v. 2 H. L Cas. 28; Bank of Republic v. Millard, 10 Wall, 152; Carr v. Bh., 107 Mass. 45.

[6] Watts v. Christie, 11 Beaven, 546 (1849); Marzetti v. Williams, 1 Barn. & Ad. 415, (18—) is a leading case.

[7] Rolin v. Steward, 14 C. B. (5 J. Scott) 607; 78 E. C. L. R. In this case, Williams, J., said: "I think it can not be denied that if one who is not a trader, were to bring an action against a bank for dishonoring a check at a time when he had funds of a customer in his hands sufficient to meet it, and special damages were alleged and proved the plaintiff would be entitled to recover substantial damage." See Daniels on Neg. Inst. (3d ed.) § 1642, p. 656; 2 Parsons on N. & B., pp. 63, 64, and notes.

[8] Per Williams, J., in Rolin v. Steward, *supra.*

[9] "These dealings in bank checks," says Johnson, J., in Fogarties v. Bank, 8 Am. Law. Reg. 393, (O. S.) (1860), "stand upon peculiar grounds. The exigencies of trade do not admit of the delays attending the process of acceptance, or arising from the efflux of days of grace. If these drafts are delayed, if the bank, being in funds, be at liberty to refuse payment, the inevitable consequences to the parties disappointed can be none other than such as the want of scrupulous punctuality always inflicts. The drawer's credit suffers; * * * the whole commercial community, and every interest dependent upon commerce, (and that is every interest in the civilized world) is affected. These instruments pass daily from hand to hand, and perform good services in exchanges and settlements. The public confidence in them is of a two-fold nature. It is, first, in the drawer. Is he of known character? One who habitually draws only on known resources? It is based, again, upon the certainty of bank usage. It is a fixed rule of trade, that when in possession of a drawer's funds, the bank will

his check, according to the ordinary course of human events.[10]

III. *Elements of Damages—Illustrations.* In Rolin v. Steward, *supra*, the plaintiff's check was refused through a clerical error in balancing the plaintiff's account, the bank supposing the plaintiff did not have sufficient funds on deposit to meet it. The verdict was for £500. Referring to the amount of the verdict, Cresswell, J., remarked: "As to the amount, that is a question which is always extremely difficult for the court to deal with. But inasmuch as we are disposed to think that the jury have under the circumstances awarded the plaintiff a very large sum; the counsel may possibly relieve us from giving any ultimate opinion as to the extent to which the verdict ought to be reduced." The parties then agreed that the verdict should be reduced to £200.

In Marzetti v. Williams, *supra*, plaintiff drew a check on his banker, to whom it was presented at a time when he had sufficient funds on deposit to meet it, but the check was dishonored through the negligence of the clerk in failing to enter to the plaintiff's credit in the proper book, a deposit that had been made on the morning that the check was presented. On the following day the check was paid. No special damage was proved, but the jury found a verdict for the plaintiff for nominal damages, which the court sustained.

In Boyd v. Fitt,[12] the defendant failed to honor a draft of the plaintiffs when in funds, whereby the plaintiff's business in Glasgow was suspended, their business in Dublin much injured and they lost the agency of an Australian firm. The jury gave damages for the three heads, which finding was sustained, the court holding that the suspension of the Glasgow trade was within both branches of the rule of Hadley v. Baxendale [13] and that the damages sustained under the other two heads of loss were within the rule of Rolin v. Steward,[14] the natural result of the defendants breach of the contract. "I entirely concur," said the Lord Chief Baron, "in what seems to have been the opinion of Mr. Justice Crompton in Smeed v. Ford, [15] and of Mr. Baron Wilde in Gee v. the L. & York Railway Co., [16] that the rule professed to be laid down in Hadley v. Baxendale, is not 'capable of meeting all cases.'"

In Larios v. Bonany Y Gurety,[17] the plaintiff recovered in the trial court (1) the expense of protest (2.) Loss of some pork which he had been obliged to sell to get money, (3.) Expense of journeys to place of trial and expense while at the trial, (4.) General damages for injury to the personal credit and for other loss. On appeal he was not permitted to recover item 2, because that was too remote, such loss not being a natural consequence of the breach of the contract, nor item 3, for costs are a full indemnity. But he was allowed items 1 and 4.

In Prehn v. The Royal Bank of Liverpool[18] the defendants, bankers in Liverpool, by their letter of credit undertook to accept the drafts of the plaintiff's Alexandria firm and the plaintiffs undertook to put them in funds to do so. Before maturity the defendants gave notice that they would be unable to pay the drafts at maturity; and the customer was put (1) to expense of a commission to another party to take up the bills; (2) the expense of protesting them; and (3) the expense of telegrams. They were entitled to recover all these items. The principle of Hadley v. Baxendale was applied in this case.[19]

In Riggs v. Lindsay,[20] plaintiff sued the defendant on an implied agreement to accept bills, constituted by the latter having instructed the former to purchase goods on defendants account and to draw upon him for the price. The bills having been dishonored by the defendants were protested and returned to the plaintiff, who took them up and paid the ten per cent. damages which the law (of South Carolina) allowed to holders of bills returned under protest. These damages were allowed plaintiff.

IV. *Defenses.* (*a.*) *Insufficient Amount on Deposit.* It is a good defense to an action of this kind, of which the bank may avail itself, that it had not sufficient unincumbered funds of the depositor with which to make full payment, so that it could take up and hold the check as a voucher; for the bank is under no obligation to make part payment.[21] Of course, if the bank has a prior lien on the drawer's funds it is not held to honor his check. It is only when there is a sufficient amount to the customer's credit, to meet

on no account, permit itself to withhold payment if properly notified. These two things being fixed in the public mind, universal undoubting confidence obtains.',

[10] Rolin v. Steward, 14 C. B. 295 (1854); s. c. 23 L. J. (C. P.) 148; 78 E. C. L. R.; see also Morse on Banks and Banking, (2d ed.) 522 *et seq.*; Grant on Banks and Bankers, p. 45; Byles on Bills, (Sharswood's ed.) p. 18; 2 Parsons on Notes and Bills, pp. 63, 64, and notes. In Rolin v. Steward, *supra*, there was no evidence that any special damages had been sustained, but Lord Chief Justice Campbell, in leaving the case to the jury, told them that they ought not limit their verdict to nominal damage, but should give the plaintiffs such temperate damages as they should judge to be reasonable compensation for the injury they must have sustained from the dishonor of their check.

[11] In this case Lord Tenterden, C. J., said: "I can not forbear to observe, that it is a discredit to a person, and therefor injurious in fact, to have a draft refused payment for so small a sum, for it shows that the banker has very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground that the action is founded on a contract between the plaintiff and the bankers, that the latter, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his check; and there having been a breach of such contract, the plaintiff is entitled to recover nominal damages." In the same case, Taunton, J., observed: "The defendants were guilty of a breach of duty, which duty the plaintiffs at the time had a right to have performed. * * * Here, independently of other considerations, the credit of the plaintiff was likely to be injured by the refusal of the defendant to pay the check; and as it was the duty of the defendants to pay the check when it was presented, and that duty was not performed, I think the plaintiff, who had a right to its being performed, is entitled to recover nominal damages."

[12] 14 Irish Common Law (N. S.) 43 (1862).

[13] 9 Exch. 341; 23 L. J. (Ex.) 179.

[14] C. B. 595.

[15] Ell. & Ell. 616.

[16] 6 Hurl. & Nor. 221.

[17] L. R. 5 Privy Council App, 346 (1873).

[18] L. R. 5 Ex. 92 (1870).

[19] *Supra.*

[20] 7 Cranch (U. S. S. C. Rep.) 500 (1813).

[21] Coats v. Preston, 105 Ill. 473 (1883); Morse on Banks & B. 521; 2 Pars. on N. & B. 78; *In re* Brown, 2 Story Cir. Ct. R. 502 (1843). "Now," says the court in *In re* Brown, *supra*, "the bank is not bound to pay unless it is in full funds, and it is not obliged to pay or accept to pay, if it has partial funds only, for it is entitled to the possession of the check on payment, and, indeed, in the ordinary course of business, the only voucher for the bank in any payment is the production and receipt of the check, which the holder can not safely part with unless he receives full payment, nor the bank exact unless under like circumstances" see further, Kymer v. Laurie, 18 L. J. (Q. B.) 216.

the check, that the bank is liable for non-payment thereof, *i. e.*, when the bank is a debtor to the depositor in that amount.[22]

(*b.*) *Bank "Time to Avail Itself of Funds."* A bank is entitled to a reasonable time in which to ascertain whether the drawer is in funds to meet the check.[23] Hence, in an action against the bank it may be shown that the funds were deposited so immediately before the presentment of the check, that the bank had not a reasonable time in which "to avail itself of the deposit,"[24] *i. e.*, to pass the deposit to the credit of the drawer.[25] A reasonable time will be allowed the bank to do this. But no case has yet laid down a rule as to what is such reasonable time. Indeed, that would be almost impossible, as each case must be determined upon its own particular circumstances. This should be governed largely by the volume of the bank's business; and perhaps the amount of business on that particular day, as well as the bank's clerical force, would be elements in determining the reasonableness of time. Of course one day would be sufficient time; so is three hours;[25] and two hours[26] has been held to be a reasonable time.

EUGENE MCQUILLIN.

St. Louis, Mo.

[22] Birchall v. Third Nat. Bk. 15 W. N. C. 174; Bank v. Peck, 127 Mass. 292, and see cases *supra*.

[23] Fernandey v. Glynn, 1 Camp. 426 and notes.

[24] Morse on Banks and Banking (2nd ed.) 521-2; Grant on Banks and Bankers, 45; Rolin v. Steward, 14 C. B. 595; Marzitti v. Williams, 1 B. & A. 415; Whittaker v. Bank of England, 6 Car. & P. 700 (1834); 1 C. M. & R. 744 (1835); 2 Pars. on N. & B. 63—4.

[25] In Marzetti v. William, *supra*, a deposit which together with the other funds of the customer already in the bank, sufficient to meet the draft was made a few minutes before 11 o'clock in the forenoon, and the check was presented for payment ten minutes before three o'clock in the afternoon of the same day. This was held to be a sufficient time intervening for the bank "to avail itself of the deposit."

[26] In Rolin v. Stewart, *supra*, the deposit was made at one o'clock P. M., and the check presented at three P. M the same day. The two hours was held to be sufficient time.

ATTORNEY AND CLIENT—ATTORNEY'S LIEN ON JUDGMENT.

MIDDLESEX FREEHOLDERS v. STATE BANK.

New Jersey Court of Chancery.

Where one who has recovered a judgment at law against a receiver, who is also maintaining a suit for foreclosure against the former, gives his attorney a note for his costs and services in both suits, and agreed that the judgment should be held as collateral security for its payment, the attorney is entitled to receive from the receiver payment of the costs of the suit at law, in full, with interest from the date of the judgment, and dividends on the rest of that judgment or so much of them as will be sufficient to pay his note and interest, the receiver's claim to offset the decree for deficiency against the judgment being disallowed.

On petition and stipulation as to facts and affidavits.

W. Strong, petitioner, in *pro. pers.*; *A. V. Schenck*, for receiver.

The CHANCELLOR delivered the opinion of the court.

James Short recovered a judgment in the Middlesex Circuit Court, April 24, 1877, against the receiver of the State Bank at New Brunswick, for $312.99 damages, and $66.33 costs, in an action of *assumpsit* brought against him by the bank before the appointment of the receiver. The suit was pending when the receiver was appointed, and he was substituted as plaintiff. Short's judgment was upon his set-off in the suit. The petitioner was his attorney in that suit.

In May, 1877, Short gave to the petitioner, for the amount of his counsel fee ($175) and costs ($66.33) in that suit, and his fee ($30) for his professional services in a foreclosure suit brought by Joseph Fisher against him, his note, dated the 31st of that month, for $221.33, payable at two months from date. Within a few days after the recovery of the judgment, and before the giving of the note, it was agreed between the petitioner and Short that the former should hold the judgment as collateral security for his whole claim against the latter (the items first mentioned), and that if he should be able to collect the money due thereon he should retain the amount due him (unless he should have previously received it from Short), and should pay over to Short the balance. Short died intestate June 19, 1877. He never paid the petitioner's claim nor anything on account of it. When the judgment was recovered there was pending in this court a foreclosure suit, (the one before mentioned), brought by Joseph Fisher against Short, on a mortgage given by the latter to the bank and assigned by it to Fisher merely for the purpose of foreclosing it in his name. In that suit a final decree for foreclosure and sale of the mortgaged premises was made February 19, 1877. The decree also contained the usual decree for the payment of deficiency by Short. Execution for the sale of the mortgaged premises was issued April 20, 1877, and the property was sold under it November 13, 1877. The deficiency was not ascertained until August 19, 1878, when an order was made establishing it at $3,685.36, and directing that execution issue against Short to collect it. Short died, as has been stated, in June, 1877, which was long before the deficiency was ascertained. His administratrix, under the order of this court to limit creditors in this cause, in August, 1877, presented to the receiver her claim, under oath, to the money due on the judgment in the Circuit Court, subject to the petitioner's claim. It is understood that though the receiver has paid dividends to the creditors whose claims have been allowed, he has paid none on the Short claim, but has retained the dividends thereon in his own hands to await the judicial determination of the questions which are now before me. The petitioner insists that he is entitled to receive from the receiver the amount of the costs of the judgment in full, with the lawful interest thereon, and also dividends at the same rate as those paid to the other creditors upon the rest of the amount of the judgment. The receiver, on the other hand, claims that he

has a right to set off so much of the decree for deficiency as is necessary for the purpose, against the judgment, and that under the circumstances the petitioner has no claim or equity superior to his.

The assignee of a judgment, who acquired his title to it before the recovery of a judgment by the defendant in the assigned judgment against the plaintiff therein, has an equity superior to such defendant's claim to set off the one judgment against the other. The agreement between debtor and creditor that the latter shall have a claim on a specific fund for the payment of his debt, operates as an appropriation of the fund *pro tanto* to the payment of the debt, and as an equitable assignment of the fund to that extent. And the assignment of a chose in action may be by parol. In the case in hand it was agreed between Short and the petitioner that the latter should have a lien upon the judgment for the amount due him from the former. At that time the receiver had no judgment against Short, for the decree for deficiency in the foreclosure suit had not the force and effect of a judgment at law until the time when the amount of the deficiency was ascertained, which was not until August, 1878. The equity of the petitioner is superior to that of the receiver. He is entitled to payment of the costs of the judgment in full, with interest thereon from the date of the recovery of the judgment. They are costs which were awarded against the receiver in a suit prosecuted by him for the benefit of his trust, and were payable at once and in full. The petitioner is entitled to the dividends on the rest of the amount of the judgment, or so much of them as will be sufficient to pay the balance due him from Short's estate on the note. In view of the fact that the assigment was by parol, merely, and therefore the receiver could not safely recognize the prisoner's rights without the direction of the court, no costs should be allowed to the petitioner.

NOTE.—In the King's Bench, in England, the rule is that judgment between the parties cannot be set off so as to deprive the attorney of his lien for costs.[1] But the rule is otherwise in the Common Pleas.[2]

In Collett v. Preston[3] an application to set off costs recovered by B. against A., against costs recovered in a suit respecting the same matter, by A. against B, was refused, because it would interfere with the solicitor's lien.[4]

In *Ex parte* Cleland,[5] C.'s solicitor was held entitled to a lien on costs ordered to be paid to C. by D., as against a debt due from C. to D., at the time when D. made an assignment for the benefit of his creditors.

Some American cases hold that the solicitor's lien is subordinate to equities existing between the two parties to the judgment[6] even after the judgment has been assigned to the attorney, as security for his costs[7] unless the claims sought to be set off arise out of other matters[8] and notice of the lien has been given by the attorney.[9]

The lien of an attorney, however, in an assigned judgment is now generally recognized as superior to any right of set-off as to the judgment between the parties;[10] even where the judgment sought to be set off was recovered before the other judgment,[11] especially where the judgment has been assigned to the attorney as security for his costs.[12]

A defendant against whom a judgment has been recovered, cannot, by thereafter purchasing a judgment against the plaintiff, off-set it so as to defeat the attorney's lien.[13]

The attorney must prove clearly what is the amount of his costs and disbursements[14] and move promptly to secure his lien.[15]

JOHN H. STEWART.

1 Mitchell v. Oldfield, 4 T. R. 123 Randie v. Fuller, 6 id. 456; Glaister v. Hewer. 8 id. 69; Middleton v. Hill, 1 M. & S. 240; Mellville v. Leesom, 1 E., B. & E. 324; Simpson. v. Lamb, 7 E. & B. 84; see Mercer v. Graves, L R., 7 Q. B. 499.

2 Vaughan v. Davies, 2 H. Bl. 440; Hall v. Ody, 2 B. & P. 28; 4 id. 22; George v. Elston, 1 Scott, 518; and in Chancery, Taylor v. Popham, 15 Ves. 72; *Ex parte*, Rhodes, id. 541; Gurish v. Donovan, 2 Atk. 166; Shine v. Gough, 2 B. & B. 33.

3 15 Beav. 458.

4 See Nicholson v. Norton, 7 Beav. 67. L. R., 2 Ch. App. 808.

6 Porter v. Lane, 8 Johns. 357; Ross v. Dole, 13 id. 306; People v. Manning, 13 Wend. 649; Crocker v. Claughly, 2 Duer, 684; Shirts v. Irons, 54 Ind. 13; *Ex parte* Lehman, 59 Ala. 631.

7 Cooper v. Bigelow, 1 Cow. 206; Wright v. Treadwell, 12 Tex. 252.

8 Carter v. Bennett, 6 Fla 215; Robertson v. Shutt, 9 Bush, 659; Mohawk Bank v. Burrows, 6 Johns, Ch. 317.

9 Hurst v. Sheets, 21 Iowa, 501; Andrews v. Morse, 12 Conn. 444; Leavenson v. Lafountane, Kan. 523; Peckham v. Barcalow, Hill & Den. 112; Johnson v. Ballard, 44 Ind. 270; Daniels v. Pratt, 6 Lea, 443; See Newbert v. Cunningham, 50 Me. 231; Walker v. Sargeant, 14 Vt. 247.

10 Terney v. Wilson, 16 Vr. 282; Shapley v. Bellows, 4 N. H. 347; Dunkin v. Vandenberg, 1 Paige, 622; Gridley v. Garrison, 4 id. 647 (but see N coll v. Nicoll, 16 Wend. 446); Zogbaum v. Parker, 55 N. Y. 120; Firmenich v. Bovee, 1 Hun. 532; Prouty v. Swift, 10 id. 232; Davidson v. Alfaro, 16 id. 353; 80 N. Y. 660; Eberhardt v. Schuster, 19 Abb. N. C. 374; Currier v. Boston R., 37 N. H. 223; Boyer v. Clark, 3 Neb. 161; Rice v. Garnhardt, 35 Wis. 282; Warfield v. Campbell, 28 Ala. 527; Renick v. Luddington. 16 W. Va. 378; Diehl v, Friester, 37 Ohio St. 473; Brown v. Bigley, 3 Tenn. Ch. 618; Wells v. Elsam, 40 Mich. 218; Ripley v. Bull, 19 Conn. 53; Stratton v, Hussey, 62 Me. 289.

11 Benjamin v. Benjamin, 17 Conn. 110; Ely v. Cooke, 2 Hilt. 406; 28 N. Y. 365; Perry v. Chester, 53 id. 240; Ennis v. Curry, 22 Hun. 584; Naylor v. Lane (N. Y.), 29 Alb. L. J. 212; see Dingee v. Shears, 29 Hun. 210; Stillman v. Stillman, 4 Lea. 271; Jeffres v. Cochrane, 47 Barb, 557; 6 Alb. L. J. 198; Prince v. Fuller, 34 Me. 122; Neil v. Staten, 7 Heisk. 290. See further, 1 Am. Law Reg. (N. S.) 419, note.

12 Rumrill v. Huntington, 5 Day, 163.

13 Bradt v. Koon, 4 Cow. 416.

14 Hooper v. Brundage, 22 Me. 460; Adams v. Lee, 82 Ind. 587; Ocean Ins. Co. v. Rider, 22 Pick, 210.

15 Holt v. Quinby, 6 N. H. 79; see Stone v. Hyde, 22 Me. 318.

INSURANCE — FIRE — ALIENATION — SALE OF PART OF PREMISES.

BALDWIN v. HARTFORD FIRE INS. CO.

Supreme Court of New Hampshire.

An alienation by the insured, without notice, of one of several parcels of real estate covered by a fire policy containing a stipulation against alienation, avoids

the policy as to property not alienated, unless the court can say as matter of law, that the risk of the remaining property is not increased.

Assumpsit, on a policy of insurance. Facts agreed. The plaintiff, owning a tract of land adjoining land owned by his wife, built a house and outbuildings partly upon his own and partly upon his wife's land, and procured a policy of insurance in the defendant company for $1000 on the house, $300 on the barn, and $100 on the carriage-house. The premises were destroyed by fire Oct. 27, 1877. In June, 1877, the plaintiff conveyed the tract of land owned by him to his daughter, and she conveyed it to her mother, the wife of the plaintiff, as stated in Baldwin v. Phœnix Ins. Co,, *ante* 164. No notice was given to the defendants of the conveyances. The barn was on the wife's land, and was worth more than $300, the sum insured. The house and carriage house were on the lot conveyed by the plaintiff to his daughter. The policy contains the following: "If any change takes place in the title or possession of the property, whether by sale, transfer, or conveyance, legal process or judicial decree, * * * then, and in every such case, this policy shall be void."

W. & H. Heywood, for the plaintiff; *S. C. Eastman*, for the defendants.

CLARK, J., delivered the opinion of the court:

It was decided in Baldwin v. Phœnix Ins. Co., *ante* 164, that the conveyance of his land by the plaintiff to his daughter, and by her to her mother, was a change in the title of the property such as avoided a policy containing a provision against alienation. By reason of the change of title the plaintiff can not recover the insurance upon the house and carriage-house.

It is suggested that the plaintiff had an insurable interest in this property at the time of the loss as occupant and tenant by the curtesy, because the daughter immediately conveyed the premises to the wife of the plaintiff. But even if the plaintiff had an insurable interest at the time of the fire, the conveyance to the daughter, and from the daughter to the wife, was a change of title that defeats the plaintiff's right of recovery upon this policy, which contains a stipulation that any change of title shall render the policy void. The question is not whether there still remained an insurable interest in the plaintiff, but whether plaintiff can recover under this policy. By the express terms of his contract, the plaintiff agreed that he should have no right of action for property conveyed without notice to the defendants; and the law does not annul or alter his contract. Atherton v. Ins. Co., 109 Mass. 32; Edmunds v. Ins. Co., 1 Allen 311; Barnes v. Ins. Co., 51 Me. 110.

As to the barn there seems to have been no change of title. It stood upon land of the plaintiffs wife when the policy was issued and when the loss occurred, and no claim is made by the defendants that the title was not originally correctly described. We understand that all objections to the description of the title to the barn are waived. This presents the question, whether the alienation by the insured of one of several parcels of real estate separately valued in the same policy, containing a provision against alienation, avoids the policy as to the parties not alienated. Upon this point the authorities are not agreed. May Ins., ss. 277, 278; Clark v. Ins. Co., 6 Cush. 342; Kimball v. Ins. Co., 8 Gray 33; Lee v. Ins. Co., 3 Gray 583, 594; Friesmuth v. Ins. Co., 10 Cush. 587; Gould v. Ins. Co., 47 Me. 403; Barnes v. Ins. Co., 51 Me. 110; Ins. Co. v. Spankneble, 52 Ill. 53; Quarrer v. Ins. Co., 10 W. Va. 507; Merrill v. Ins. Co., 73 N. Y. 452.

Without considering the question whether the contract of insurance in this case is to be regarded as entire and indivisible because a gross sum is insured for a single and entire consideration (Plath v. Ins. Co., 23 Minn. 479), or as severable and divisible because the amount of insurance is apportioned upon separate and distinct items of property covered by the policy (Merrill v. Ins. Co., 73 N. Y. 452), let us apply the ordinary rules for the interpretation of contracts to this policy. In the construction of contracts the intention of the parties must govern, the subject matter of the agreement is to be considered, and that interpretation adopted which will give effect to intention. The object of the stipulation in a policy of insurance against a sale of the property insured is apparent. It is obviously based upon the idea that the risk and hazard of loss may be increased by a change of ownership. All men are not equally prudent and cautious in the care of their property. The insurers may be willing to insure the property of A at a certain rate, when they would not insure the same property for B at any rate, nor insure it for A if B was the owner of other property so situated as to affect the hazard of A's property. The stipulation being a reasonable one which the insurers have a right to make, and its object being to protect the property insured from increased risk, should be so construed as to give effect to the intention of the parties. If the court can say as matter of law that the alienation of one piece of property does not increase the risk of the other property covered by the same policy, then the reason of the condition ceasing, the condition itself may be disregarded. But unless the court can say as matter of law that the risk is not increased, a reasonable interpretation of the contract requires that the stipulation shall be so construed as to give effect to the intention of the parties, and afford that protection against increased hazard which it was designed to secure. Another general and elementary rule in the construction of contracts is, that words are to be understood in their ordinary and popular sense, except in those cases in which the words used have acquired by usage a peculiar sense different from the ordinary and popular one. In this case no words are used which have acquired by usage a different signification from the ordinary and popular one; and if the lan-

guage is to be understood in its ordinary and popular sense, the conclusion is irresistible that the sale, transfer, or conveyance of the property or conveyance of the property insured renders the policy void, not merely as to the property alienated, but void as to the whole property insured. Another rule of interpretation is, that the terms of a contract are to be understood so as to have an actual and legal operation, and the construction is to be such that the whole instrument or contract and every part of it may take effect, if it be possible consistently with the rules of law and the intention of the parties. The application of this rule of construction leans to the same result. If the stipulation in the policy relating to the alienation of the property insured is to be limited and made applicable only to the property alienated, it is meaningless and superfluous. The contract of insurance is a contract of indemnity to the person and not to the thing insured. It does not run with the subject-matter of insurance, and pass as an incident by any assignment or conveyance of it; and therefore a sale, transfer, or conveyance of any part of the property insured renders the policy void as to the property sold or conveyed without any stipulation in the policy prohibiting alienation. To give any legal effect to the conditions in the policy before us relating to the sale, transfer, or conveyance of the property, it must be construed and understood to mean what the langnage imports, that a sale, transfer, or conveyance of the property renders the policy void.

Judgment for the defendant.

BLODGETT, J., dissented.

WEEKLY DIGEST OF RECENT CASES.

COLORADO, ... 11, 26
GEORGIA, ... 17, 18, 21, 24
INDIANA, ... 5
IOWA, ... 19, 20
LOUISIANA, ... 27
MARYLAND, ... 9, 28
MASSACHUSETTS, ... 1, 4, 32
MICHIGAN, ... 12, 14, 22, 32
MINNESOTA, ... 13
NEBRASKA, ... 3, 8, 23
TENNESSEE, ... 2, 15, 16
TEXAS, ... 25
WEST VIRGINIA, ... 31
FEDERAL CIRCUIT, ... 6, 7, 10
ENGLISH, ... 29, 30

1. ACTION FOR WRONGFUL DEATH—PREMATURE BIRTH AND DEATH.

Where a child is born when its mother was between four and five months in pregnancy, the premature birth being the consequence of a miscarriage produced by the falling of the mother on a defect in a highway, the administrator of the child can not maintain an action for wrongful death under the statutes, though the child lived for several minutes. *Dietrich v. Northampton*, S. J. C. Mass. Oct. 1884; 7 Mass. L. Rep. Nov. 6, 1884.

2. ACTION—MALICE—INJUNCTION OF EMPLOYER AGAINST TRADING WITH MERCHANT.

No action lies to the merchant, against a railroad company, or another, for posting notice to its employers, forbidding them to trade or purchase goods from a certain merchant, under penalty of being discharged, though the notice be posted maliciously and operates to deter employes of the company and others from trading with him, and thus ruin his business. An act, not unlawful, done in a manner not unlawful, though from wicked and malicious motives, causing injury is not actionable. *Payne v. Western Atlantic R. Co.*, S. C. Tenn. Nov. 1, 1884.

3. CONTRACT—SPECIFIC PERFORMANCE—RESCISSION.

A purchased of B a certain lot, paying thereon $50 in cash, and agreeing in the deed, as part of the consideration, to erect a building of a certain description thereon. *Held*, that B was entitled to the performance of the contract, and in case of the failure of A, after a reasonable time, upon tendering back the money received, to rescission. *Willard v. Ford*, S. C. Neb. Oct. 8, 1884; 20 N. W. Rep. 859.

4. DAMAGES—NON-DELIVERY OF ARCHITECT'S PLANS.

The damages recoverable from a common carrier for loss of architect's plans for constructing a house are the expenses necessary in procuring other plans of like character, and not in addition the loss caused by delay in the construction of the house in consequence of the delay in procuring such new plans. *Mather v. Am. Exp. Co.* S. J. C. Mass. Daily Law Rec. Nov. 6, 1884.

5. DAMAGES—PROXIMATE—BREACH OF CONTRACT.

The loss caused by the use of an imperfectly adjusted reaper is not the proximate consequence of the breach of a contract to attach a rake and other things to a reaper. *Fuller v. Curtiss*, S. C. Ind. Oct. 18, 1884.

6. EQUITY—CANCELLATION OF DEED—INADEQUACY OF CONSIDERATION.

Mere inadequacy of price is not sufficient to avoid the sale of real property; but when such inadequacy is gross and the vendor was needy and of weak mind and acted upon the impression that he was indebted to the vendee, when he was not, equity will give relief by treating the vendee as the trustee of the property for the benefit of the vendor or his representatives. $400 held to be a grossly inadequate price for property worth not less than $1500. *Parkhurst v. Hosford*, U. S. C. C. D. Oreg. Oct. 31, 1884; Daily Oreg. Nov. 1, 1884.

7. EQUITY—ENFORCEMENT OF TAX WHEN ENJOINED—IRREGULARITIES IN TAX.

Equity will not enjoin the enforcement of a tax, for mere irregularities in the exercise of a constitutional taxing power, or for excess in the amount of the tax, unless it be alleged and shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered, without demanding a receipt in full. Gillette v. City of Denver, U. S. C. C. D. Col., Oct. 13, 1884; 4 W. C. Rep. 206.

8. EVIDENCE—EXPERTS—WEIGHT OF TESTIMONY.
Witnesses who show scientific or practical skill and knowledge and experience as to matters of which they testify are competent as experts. The weight to be given to their testimony is for the jury to determine. *Sioux City R. Co. v. Finlayson*, S. C. Neb. Oct. 14, 1884; 20 N. W. Rep. 850.

9. EVIDENCE—HABIT—PAYMENT.
In an action of assumpsit against an administrator to recover a sum of money alleged to be due, it is not proper to ask a witness if the defendant's intestate "was in the habit of leaving his bills unpaid." *Lehr v. Conkliug*, Md. Ct. App. 13. Md. L. Rec. 71.

10. EVIDENCE—INSANITY—OPINION OF NON-PROFESSIONAL WITNESS.
Upon the trial of an issue involving the sanity of a person, the opinion of a non-professional witness, based upon his own observations, is competent evidence. and is entitled to weight, according to the intelligence of the witness, his means of information and the character of the derangement. *Parkhurst v. Hosford*, U. S. C. C. D. Oreg. Oct. 31, 1884; Daily Oreg., Nov. 1, 1884.

11. EVIDENCE—MARKET VALUE OF STOCK, HOW SHOWN—REPORTS OF SALES BY EXCHANGE BOARD.
The market value of shares of stock cannot be shown by evidence of the "report of sales" made by a stock exchange board, in the absence of evidence showing how such "reports of sales" were made up, where the information they contained was obtained, and whether the quotations of prices made were derived of actual sales or otherwise. *Vogt v. Cape*, S. C. Cal., Oct. 21, 1884; 4 W. C. Rep. 222.

12. EVIDENCE—PARTNERSHIP—TRANSACTION WITH PARTNER.
In an action against a partnership to recover the price of articles claimed to have been delivered to them to be sold, when defendants claim that such articles were received by a member of the firm as an individual transaction, and that the other members knew nothing of it until after dissolution, the books of the firm may be admitted in evidence, and one of the partners may be asked whether plaintiff's account on the books of the firm showed a credit to him of the amount claimed. *Grant v. Masterton*, S. C. Mich., Oct. 22, 1884; 20 N. W. Rep. 885.

13. EVIDENCE—RES GESTÆ—DESCRIPTION OF ASSAILANTS BY VICTIM.
The description of the assailants, given by the victim of an assult to a police officer a few minutes after the assault, is part of the *res gestæ*, and provable. *State v. Horan*, S. C. Minn. Oct. 13, 1884; 20 N. W. Rep. 905.

14. MASTER AND SERVANT—CONTRACT—CONSTRUCTION—TERM OF SERVICE—QUESTION FOR JURY.
Plaintiff entered into the service of defendant on November, 1880, under a written contract dated October 29, 1880, on a salary "of $2,000 per year, payable in monthly payments," and continued in such service until March 21, 1883, when he was discharged. *Held*, in an action by plaintiff to recover the balance of the year's salary, that the contract was admissible in evidence, and that whether or not the hiring was from year to year or from month to month was a question for the jury. *Tallon v. Grand, etc. Co.*, S. C. Mich. Oct. 22, 1884; 20 N. W. Rep. 878.

15. MASTER AND SERVANT—DEFECTIVE MACHINERY—BURDEN OF PROOF.
In an action by an employee against his employers to recover damages for an injury to the plaintiff caused by a defective machine or tool, the burden of proof is upon the plaintiff, to show that the machine or tool was unsuitable and insufficient. *East Tenn. Va & Ga. R. Co. v. Stewart*, S. C. Tenn. Nov. 1, 1884.

16. NEGLIGENCE—PROXIMATE CAUSE—ENGINEER AND FIREMAN—FELLOW-SERVANTS.
Where a fireman on a railroad locomotive was killed by the explosion of the boiler, while the engine was standing on the track ready to start with a train of cars, and the engineer failed to come thirty minutes before the time of starting as required by a rule of the company, it was error to charge the jury that if the proof satisfied them that the engineer had failed to comply with the rule, and was further satisfied that his delay was the proximate cause of the accident, then the plaintiff would be entitled to recover. *Nashville, Ch. & St. Louis R. Co. v. Standman*, S. C. Tenn. Nov. 1, 1884.

17. NUISANCE—LESSEE RENTING PREMISES WITH KNOWLEDGE.
A tenant can maintain an action against a railroad company maintaining a nuisance on the demised premises, although he leased them and renewed his lease with full knowledge thereof. *Central R. Co. v. English*, S. C. Ga. Oct. 21, 1884.

18. NUISANCE—LIABILITY OF SUCCESSOR FOR MAINTENANCE OF.
Where one railroad company erected a nuisance, and was subsequently leased to another company which continued to maintain such nuisance, if the owner of the property on which it was situated notified the president and officers of the lessee company of it, and his tenant also notified the section master of the company, this was sufficient notice and demand for abatement, and the tenant could bring an action for injuries resulting to him without more. Notice of the nuisance is sufficient. *Central R. Co. v. English*, S. C. Ga. Oct. 21, 1884; Judge's Head Notes.

19. PRACTICE—STENOGRAPHER'S TRANSCRIPT OF EVIDENCE—HOW PREPARED.
Where the trial court orders the evidence to be taken down in short-hand, and it is so done and properly certified, and it is afterwards transcribed, this is a sufficient compliance with the provision of the statute that the evidence shall be taken down in writing. It is not necessary that the translation or transcript of the evidence should be made at the time of the trial. *Ross v. Loomis*, S. C. Iowa, Oct. 9, 1884; 20 N. W. Rep. 749.

20. PROMISSORY NOTE—ASSIGNMENT BY EXECUTOR IN ANOTHER STATE—ACTION ON NOTE IN THIS STATE.
A party to whom an executor, appointed by a will duly probated in another state, but not probated in this state; has assigned a promissory note in accordance with a bequest in such will, may maintain an action on the note against the payee in this state. *Campbell v. Brown*, S. C. Iowa, Oct. 8, 1884; 20 N. W. Rep. 745.

21. RAILROAD—TICKET—SPECIAL CONTRACT OF REASONABLE IMPORT BINDING.
Where, upon the sale of a round trip ticket with coupons attached for passage over two roads, a special contract was made to the effect that the

passenger should sign his name in Jacksonville, Florida, (the terminal point of the trip) before the agent there, before he could return on the ticket, such special contract controlled; and if the passenger failed to sign as agreed, the company had the right to eject him. This being done politely by the conductor, the passenger was not entitled to damages. *Moses v. E. Tenn., etc., R. Co.*, Oct. 21, 1884; Judge's Head Notes.

22. RES ADJUDICATA—FORMER SUIT NOT TRIED ON MERITS—EVIDENCE AS TO GROUND OF JUDGMENT.
When a plea of former suit and judgment is set up as a defense in a subsequent action on a claim, and the record fails to show why the judgment was rendered in favor of defendant, the testimony of the justice of the peace by whom the judgment was rendered may be admitted to show that the cause was dismissed, and not tried on its merits, because the claim was not due at the time the suit was brought. *Wood v. Faut*, S. C. Mich. Oct. 22, 1884; 20 N. W. Rep. 897.

23. SALE—RESCISSION—DUTY OF VENDEE TO RETURN—WAIVER.
When, by the terms of a contract of sale of an article of personal property, the property is to be returned to the vendor, if not satisfactory to the vendee, the refusal of the vendor to receive the property will relieve the vendee from the necessity of returning it before he can rescind the contract, such refusal being a waiver of the vendor's right to a return thereof. *Sycamore, etc., Co. v. Grundrad*, S. C. Neb., Oct. 8, 1884; 20 N. W. Rep. 832.

24. STATUTE OF FRAUDS—SALE—ACCEPTANCE—PASSING OF TITLE—LOSS BY FIRE.
Weighing, agreement upon price of goods, and that they should remain in seller's possession till next morning, when payment and shipment was to be made, handing bill to purchaser, and his endorsement of "O. K." over his signature, thereon, all were not sufficient to transfer the title to him, and the goods having burned during the night, he could not be sued for their value, under the statute of frauds. *Gunn v. Knorp*, S. C. Ga., Oct. 21, 1884.

25. SUNDAY CONTRACTS—SALE ON SUNDAY—RIGHTS OF CREDITORS.
Where the contract of sale was entirely executed on Sunday, title passed to the purchaser, and the vendee could not recover, consequently an attaching creditor could have no more right therein than the vendee. *Schneider v. Sansum*, S. C. Tex. Oct. 14, 1884; 4 Tex. L. Rev. 246.

26. TAXATION—ASSESSMENT—DESIGNATION OF OWNER.
An assessment of personal property was made to "Sulphur Banks Q. M. Co., F. Fiedler, agent." *Held*, that this was not equivalent to or the same thing as "Sulphur Bank Quicksilver Mining Company," the true name of the owner, and the assessment and tax based thereon were void. *Lake Co. v. Sulphur, etc. Co.*, S. C. Cal. Oct. 10, 1884; 4 W. C. Rep. 186.

27. TRESPASS—RAILROAD TRACK—CONSENT.
One who permits a railroad company to occupy and use his land and construct its road thereon without complaint can not reclaim it free from the servitude. *St. Julien v. Morgan, etc. Co.*, S. C. La. 18 Rep. 524.

28. TRUST—WAIVER OF COMMISSIONS—ESTOPPEL.
A trustee who has waived certain commissions allowed him, is not estopped thereby from receiving other commissions. *Denmead v. Denmead*, Md. Ct. App. 13 Md. L. Rec. 72.

29. VENDOR AND PURCHASER—COMPENSATION FOR ERRORS.
Where the particulars of an auction sale erroneously stated rental value of the property, and provided that if any error should be discovered in them, the purchaser should be entitled to compensation, the purchaser who accepted the conveyance and paid the price before discovering the error, was entitled to recover compensation. *Palmer v. Johnson*, Eng. Ct. App. May 13, 1884; 51 L. T. N. S. 211.

30. WATERS—PERCOLATION—DAMAGES.
One who permits filthy water to percolate through the ground of his own property into his neighbor's ground, is liable to the latter for all the damage done. *Snow v. Whitehead*, Eng H. Ct. Ch. Div. July 14, 1884; 51 L. T. N. S. 253.

31. WILL—CONSTRUCTION—DEVISE TO HEIRS OF DIFFERENT PESONS.
When an executory devise to arise on the death without issue of the prior devisee, is made to the heirs of the three sisters of such devisee, the devise is to such persons as may be found to be the heirs of each of them at the death of the prior devisee without issue, and the estate results to the heirs of the testator until the deaths of the sisters when, as each dies, one undivided third part goes to her heirs. *Tomlinson* v. *Nickell*, S. C. App. W. Va., April 19, 1884; 24 W. Va. 148.

32. WILL—REVOCATION BY MARRIAGE—MARRIED WOMEN'S LEGISLATION.
Though the laws of a state give a married woman all the rights of a *feme* sole with capacity to contract, hold and dipose of property, they have not changed the common law rule which revoked a woman's will upon marriage though no children were born. *Swan v. Hammond*, S. J. C. Mass. Oct., 1884; *contra* Noyes v. Southworth, S. C. Mich., Oct. 22, 1884; 20 N. W. Rep. 891.

QUERIES AND ANSWERS.

QUERIES.

53. A commits a crime upon a steamboat on the Mississippi River between the States of Iowa and Illinois while the boat is on the Iowa side of the river. Can the courts of Illinois take and exercise jurisdiction of the crime when the Constitution of Illinois limits the "boundaries and jurisdiction (on the west) to the middle of the Mississippi River?"

SUBSCRIBER.

RECENT LEGAL LITERATURE.

TWENTY-FIRST BLATCHFORD. Reports of cases argued, and determined in the Circuit Court of the United States for the second circuit. By Samuel Blatchford, an Associate Justice of the United States, Vol. xxi. New York, Baker, Voorhis & Co., 1884.

This volume reports the most important cases decided in the second circuit since July, 1882, the selection being made by the learned Associate Justice of the United States Supreme Court. Al these cases have been reported in all probability in the Federal Reporter, and some of them in our columns and those of our exchanges, and all of general importance already noted by us.

HAMILTON ON FRACTURES. A Practical Treatise on Fractures and Dislocations. By Frank Hastings Hamilton. Seventh American edition, revised and improved. Illustrated with 379 wood cuts. Philadelphia, Henry C. Lea's Son & Co., 1884.

This treatise has been before the public for twenty-five years, and has received such encouragement from the medical profession that the distinguished author has enlarged it considerably, and now offers the seventh edition to the public. The author is, doubtless, remembered as one of Garfield's surgeons. It is a good book for medical men and lawyers having occasion to investigate the subject. The publishers undertake nothing that it is not first-class.

BUMP'S PATENTS, TRADE-MARKS, ETC. The law of patents, Trade-marks, Labels and Copyrights: consisting of the sections of the Revised Statutes of the United States, with notes under each section, referring to the decisions of the courts and the commissioner of patents, together with the rules of the patent office, relating to patents, trade-marks and labels, with a selection of forms; also a table of cases cited and a table of patents construed. Second edition. By Orlando F. Bump. Baltimore: Cushings & Bailey, 1884.

The first edition of this work has been before the public for seven years and was favorably received. The author, who is now deceased, was by no means a brilliant man, but he was an industrious, conscientious and pains-taking worker and his clear style made his books reliable compendia of the law upon the subjects which he investigated. He never made any remarkable statements, he never engaged in earnest disputation over legal questions; he quietly and unostentatiously came to his conclusions as to what the law was, and stated them in his clear yet simple style. Thoroughness is the main feature of his writings. The treatise before us is comprised of notes upon the various statutes upon the subject, prepared in the same style substantially as his own book on Bankruptcy. This is by no means the least useful style of writing though being but a digest, it has its drawbacks. The mechanical execution of the work is good.

LEGAL MISCELLANY.

PROPERTY IN LETTERS.

The application made to the Vacation Judge by the executor of the late Lord Lytton re-opened the old question of the rights of the receiver of a letter. Nothing is more clearly established than that the receiver of a letter has a right to the possession of it, Oliver v. Oliver, 11 C. B. N. S. 139; but the authorities are also express that a man, by sending a letter to another, although he gives him a right to read and keep the letter, does not give the right to publish it, and that the writer has the right to control publication, and to restrain it. This was first decided in the poet Pope's case, Pope v. Curl, 2 Atk. 341, and from the many subsequent authorities it may be gathered, see Gee v. Pritchard, 2 Swanst. 426, that the court proceeds upon a right of property in the writer, and does not restrain publication merely because it may wound the feelings of the writer, or because a letter may have been written in confidence. The cases are rare in which executors have applied for an injunction, but there is no doubt that the right to restrain goes to the legal personal representatives of the writer, and at least two cases can be found in the books in which an injunction has been granted. In Thompson v. Stanhope, Amb. 739, the great Lord Chesterfield's executors obtained an injunction restraining publication of his celebrated letters to his son by Eugenia Stanhope, the son's widow, although the executor's were recommended "to permit the publication in case they saw no objection to the work upon reading it;" and in Earl of Granard v. Dunkin, 1 Ball & B. 207, Lord Manners, C., followed Thompson v. Stanhope without any qualification. It is considered, however, that the receiver of a letter may publish it when publication is necessary for the vindication of his character from an accusation publicly made by the writer, Percival v. Phipps, 2 V. & B. 25; but whether this justification would be available to an executor of the receiver has not, so far as we know, been decided.—*Solicitor's Journal.*

NOTES.

——"How did you come to get in jail?" asked a gentleman of a negro he saw behind the bars. "Dey put me in heah for borryin' money from a friend." "Why, they can't do that. It's no crime to borrow money." "Yes, boss, but yer see I had to knock him down wid a club several times before he would loan it ter me, an' den I had to take it outen his pocket mysef."

——"Are you the Rev. Dr. B.?" a young man inquired of a citizen on the street. "No, sir; but I am frequently taken for him. We resemble each other closely. I am a lawyer and make a specialty of divorce cases. Has your object in finding the Rev. Dr. B. any connection with matrimony?" "Well, yes," the young man blushingly acknowledged. "H'm, I thought so. Just put that card where you won't lose it."

——With the gradual dying out of the military titles, "Majah," "Colonel," "General" and the like, Tennessee has had a wonderful up-rising of civilian titles, and "doctor," and "jedge," are the commonest of distinctions. "With a more extensive judicial family," says the Memphis *Avalanche*, "than any other State, her courts are probably behind those of any other State in the dispatch of business. The placid and leisurely elegance of her Supreme Court, with its referee satellites revolving dizzily like the moons of Jupiter, is the crowning charm of the system, the ornamental bang upon the forehead."—*Ex.*

——The Philadelphia lawyers and judges have this case in hand. Aaron R. Hall inveigled Miss Jane Powell into a mock marriage, his friend who conduct-

ed the ceremony supposing it to be only a jest. But Hall introduced Mrs. Hall as his wife to several people and in several hotels. At length he went to Colorado to look after some of his property, and was killed by a fall from a horse. His relatives claim to be his lawful heirs and Mrs. Hall claims her right of dower as his widow. The question to be decided is whether the woman Mr. Hall introduced as Mrs. Hall was his lawful wife and his widow under the laws of Pennsylvania.

——"Now," said the judge, addressing a witness who had failed to obey a summons, "I shall make an example of you. This court has been runover long enough by such men as you are, and I think that about three months in the country would do you good." "I had a reasonable excuse for not coming, judge." "What was your excuse, sir?" "Sickness in my family." "That's what they all say." "You see, judge, my wife died with the cholera day before yesterday, and—." The court did not hear the rest of the excuse; the sheriff and prosecuting attorney, the lawyers—all were gone. The backsliding witness gathered up a bundle of legal-cap paper, and remarked, as he shoved it under his coat: "Better take this away. Wife needs it to put over the tops of the preserve jars."

——In the United States Circuit Court yesterday afternoon, Stephen G. Russell was convicted of counterfeiting in gilding English silver coins. This case is of interest to silvermiths and gilders, it being the first time that a criminal prosecution has been made for gilding. The defendant claimed that he gilded the shillings with no criminal intent and not with the purpose to defraud any one, but did it for his customers in the prosecution of his business. Judge Webb, in his instructions to the jury, said that the intent with which the defendant gilded these coins was immaterial to make it a crime; that Congress had passed a law making counterfeiting a crime, and that if the jury found the defendant had gilded these coins, then the government had made out a case; that the act itself was a crime without any reference to the purpose for which it was done. The jury recommended the defendant to the mercy of the court and no sentence will probably ever be imposed, as the government wished to make it a test case and serve as a warning to other gilders.—*Daily Law Record.*

——Judge Dillon, in his address before the American Bar Association, said, on the subject of codification: "There are, I think, few advocates of codification who share in Bentham's extreme views; but there are many who believe, myself amongst them, that a far less radical scheme—one more suited to human nature's daily food—is not only feasible, but desirable, viz.: a thorough revision and systematic statement, not of the whole law, but as far as it can be expediently done, of the law on the great subjects which relate to the ordinary business and life of the people; deducing and stating what is clear; removing what is archaic and obsolete; settling what is doubtful or obscure; filling in the gaps and interstices by legislative additions, never losing sight of old landmarks, sailing ever close to the shore, using whenever they will answer the purpose old conceptions, language and methods of classification, and making no changes in substantive law, except where it is demonstrably clear that change is improvement. "Codification within these conservative limits has many advocates in England, and in this country among lawyers and judges of ability and wide experience."

——Matt. Carpenter, once a student of Rufus Choate, thus wrote of him: During all this time I was with him, his health was more or less disturbed, and his face was eloquently expressive of constant anguish. Many a time I have seen him come into the office from the court-room, the personification of weariness and sorrow, so much so that often merely looking in his face has forced the moisture to my eyes. But the tear never reached my cheek before he would set me laughing with some quaint remark. I remembered his coming into the office and telling me that the supreme court of Massachusetts had just decided an important case against him, evidently to his great surprise. He threw down some books and papers on his desk, and after telling me of the decision, added in a half-serious, half-playful way, "Every judge on that bench seems to be more stupid than every other one; and if I were not afraid of losing the good opinion of the court, I would impeach the whole batch of them." Yet, notwithstanding such badinage, his reverence for the court, and especially for Chief Justice Shaw, was unbounded. As a further instance of such pleasantry, Stevenson, the sculptor, told me that he was once engaged in carving a lion of exaggerated size; that, while he was engaged on the head and main, Mr. Choate took the liveliest interest in the work, calling every morning as he came down, and every evening on his way home, to mark its progress. Stevenson, being curious, asked Mr. Choate why that work interested him so much. "Why," said Mr. Choate, "that is the best likeness of Chief Justice Shaw that I ever saw."

——W. W. Story, Judge Story's son, thus wrote of Choate: His personal appearance was remarkable. I think no one could come into his presence without being impressed by it. His broad, massive forehead was crowned with a dark mass of richly curling, fine, and almost turbulent hair, through which he constantly passed his hand, and beneath his overhanging brow were dark, deeply-sunken and somewhat weary eyes of serious intent and expression, framed in dark circles. His nose was rather large, his upper lip short; and his under lip, projecting somewhat beyond, he constantly thrust out as if to grasp and hold it firm; while a strong jaw closed and locked up, as it were, the whole face with purpose and power. His cheeks were gaunt and hollow, as if worn by study; indeed the whole face was that of a thinker and student, which long hours of labor by day and night had made haggard. There was seriousness, gravity, and a certain pathos of character and sadness of experience in its repose. In its lighter moods, it was illumined by genial gleams of humor and the summer lightning of feeling, and in moments of excitement it glowed and radiated with inward fire like a forge when the bellows are in blast. His frame was large, well knit and nervous. His ordinary gait in walking, as I remember him, was inclined to be slouching, as of a person engaged in controverted thought, and in sitting it was sunken and overweighed, as it were, into itself. When speaking in public he was full of action and nervous gesticulation. He swayed backward and forward, advancing and retreating, emphasized by coming sharply down on his heels, now bending down and now lifting himself to his full and commanding height, and enforcing his utterance with a sharp, impulsive upward gesture.